

number is the social security number (or the identification numbers assigned by the Internal Revenue Service). The identifying number of any other person is its United States employer identification number.

(10) *Address of the Assistant Commissioner International.* Any written communication directed to the Assistant Commissioner (International) is to be addressed as follows: Director, Philadelphia Service Center; 11601 Roosevelt Blvd.; Philadelphia, PA 19255; ATTN: Drop Point 543X.

[T.D. 8113, 51 FR 46629, Dec. 24, 1986; 52 FR 3796, 3916, Feb. 6, 1987, as amended by T.D. 8647, 60 FR 66076, Dec. 21, 1995]

**§ 1.1445-2 Situations in which withholding is not required under section 1445(a).**

(a) *Purpose and scope of section.* This section provides rules concerning various situations in which withhold is not required under section 1445(a). In general, a transferee has a duty to withhold under section 1445(a) only if both of the following are true:

- (1) The transferor is a foreign person; and
- (2) The transferee is acquiring a U.S. real property interest.

Thus, paragraphs (b) and (c) of this section provide rules under which a transferee of property can ascertain that he has no duty to withhold because one or the other of the two key elements is missing. Under paragraph (b), a transferee may determine that no withholding is required because the transferor is not a foreign person. Under paragraph (c), a transferee may determine that no withholding is required because the property acquired is not a U.S. real property interest. Finally, paragraph (d) of this section provides rules concerning exceptions to the withholding requirement.

(b) *Transferor not a foreign person—(1) In general.* No withholding is required under section 1445 if the transferor of a U.S. real property interest is not a foreign person. Therefore, paragraph (b)(2) of this section provides rules pursuant to which the transferor can provide a certification of non-foreign status to inform the transferee that withholding is not required. A transferee that obtains such a certification must retain

that document for five years, as provided in paragraph (b)(3) of this section. Except to the extent provided in paragraph (b)(4) of this section, the obtaining of this certification excuses the transferee from any liability otherwise imposed by section 1445 and § 1.1445-1(e). However, section 1445 and the rules of this section do not impose any obligation upon a transferee to obtain a certification from the transferor, thus, a transferee may instead rely upon other means to ascertain the non-foreign status of the transferor. If, however, the transferee relies upon other means and the transferor was, in fact, a foreign person, then the transferee is subject to the liability imposed by section 1445 and § 1.1445-1(e).

A transferee is in no event required to rely upon other means to ascertain the non-foreign status of the transferor and may demand a certification of non-foreign status. If the certification is not provided, the transferee may withhold tax under section 1445 and will be considered, for purposes of sections 1461 through 1463, to have been required to withhold such tax.

(2) *Transferor's certification of non-foreign status—(i) In general.* A transferee of a U.S. real property interest is not required to withhold under section 1445(a) if, prior to or at the time of the transfer, the transferor furnishes to the transferee a certification that—

(A) States that the transferor is not a foreign person.

(B) Sets forth the transferor's name, identifying number and home address (in the case of an individual) or office address (in the case of an entity), and

(C) Is signed under penalties of perjury.

In general, a foreign person is a non-resident alien individual, foreign corporation, foreign partnership, foreign trust, or foreign estate, but not a resident alien individual. In this regard, see § 1.897-1(k). However, a foreign corporation that has made a valid election under section 897(i) is generally not treated as a foreign person for purposes of section 1445. In this regard, see § 1.1445-7. Pursuant to § 1.897-1(p), an individual's identifying number is the individual's Social Security number and any other person's identifying number is its U.S. employer identification

number. A certification pursuant to this paragraph (b) must be verified as true and signed under penalties of perjury by a responsible officer in the case of a corporation, by a general partner in the case of a partnership, and by a trustee, executor, or equivalent fiduciary in the case of a trust or estate. No particular form is needed for a certification pursuant to this paragraph (b), nor is any particular language required, so long as the document meets the requirements of this paragraph (b)(2)(i). Samples of acceptable certifications are provided in paragraph (b)(2)(iii) of this section.

(ii) *Foreign corporation that “has made election under section 897(i).* A foreign corporation that has made a valid election under section 897(i) to be treated as a domestic corporation for purposes of section 897 may provide a certification of non-foreign status pursuant to this paragraph (b)(2). However, an electing foreign corporation must attach to such certification a copy of the acknowledgment of the election provided to the corporation by the Internal Revenue Service pursuant to § 1.897-3(d)(4).

An acknowledgment is valid for this purpose only if it states that the information required by § 1.897-3 has been determined to be complete.

(iii) *Sample certifications—(A) Individual transferor.*

“Section 1445 of the Internal Revenue Code provides that a transferee (buyer) of a U.S. real property interest must withhold tax if the transferor (seller) is a foreign person. To inform the transferee (buyer) that withholding of tax is not required upon my disposition of a U.S. real property interest, I, [name of transferor], hereby certify the following:

1. I am not a nonresident alien for purposes of U.S. income taxation;
2. My U.S. taxpayer identifying number [Social Security number] is \_\_\_\_\_; and
3. My home address is:

I understand that this certification may be disclosed to the Internal Revenue Service by the transferee and that any false statement I have made here could be punished by fine, imprisonment, or both.

Under penalties of perjury I declare that I have examined this certification and to the best of my knowledge and belief it is true, correct, and complete. [Signature and Date]”

(B) *Entity transferor.*

“Section 1445 of the Internal Revenue Code provides that a transferee of a U.S. real property interest must withhold tax if the transferor is a foreign person. To inform the transferee that withholding of tax is not required upon the disposition of a U.S. real property interest by [name of transferor], the undersigned hereby certifies the following on behalf of [name of transferor]:

1. [Name of transferor] is not a foreign corporation, foreign partnership, foreign trust, or foreign estate (as those terms are defined in the Internal Revenue Code and Income Tax Regulations);
2. [Name of transferor]’s U.S. employer identification number is \_\_\_\_\_, and
3. [Name of transferor]’s office address is

[Name of transferor] understands that this certification may be disclosed to the Internal Revenue Service by transferee and that any false statement contained herein could be punished by fine, imprisonment or both.

Under penalties of perjury I declare that I have examined this certification and to the best of my knowledge and belief it is true, correct and complete, and I further declare that I have authority to sign this document on behalf of [name of transferor].

[Signature and date]

[Title \_\_\_\_\_]

(3) *Transferee must retain certification.* If a transferee obtains a transferor’s certification pursuant to the rules of this paragraph (b), then the transferee must retain that certification until the end of the fifth taxable year following the taxable year in which the transfer takes place. The transferee must retain the certification, and make it available to the Internal Revenue Service when requested in accordance with the requirements of section 6001 and regulations thereunder.

(4) *Reliance upon certification not permitted—(i) In general.* A transferee may not rely upon a transferor’s certification pursuant to this paragraph (b) under the circumstances set forth in either subdivision (ii) or (iii) of this paragraph (b)(4). In either of those circumstances, a transferee’s withholding obligation shall apply as if a certification had never been obtained, and the transferee is fully liable pursuant to section 1445 and § 1.1445-1(e) for any failure to withhold.

(ii) *Failure to attach IRS acknowledgment of election.* A transferee that knows that the transferor is a foreign

corporation may not rely upon a certification of non-foreign status provided by the corporation on the basis of election under section 897(i), unless there is attached to the certification a copy of the acknowledgment by the Internal Revenue Service of the corporation's election, as required by paragraph (b)(2)(ii) of this section.

(iii) *Knowledge of falsity.* A transferee is not entitled to rely upon a transferor's certification if prior to or at the time of the transfer the transferee either—

(A) Has actual knowledge that the transferor's certification is false; or

(B) Receives a notice that the certification is false from a transferor's or transferee's agent, pursuant to § 1.1445-4.

(iv) *Belated notice of false certification.* If after the date of the transfer a transferee receives a notice that a certification is false, then that transferee is entitled to rely upon the certification only with respect to consideration that was paid prior to receipt for the notice. Such a transferee is required to withhold a full 10 percent of the amount realized from the consideration that remains to be paid to the transferor if possible. Thus, if 10 percent or more of the amount realized remains to be paid to the transferor then the transferee is required to withhold and pay over the full 10 percent. The transferee must do so by withholding and paying over the entire amount of each successive payment of consideration to the transferor until the full 10 percent of the amount realized has been withheld and paid over. Amounts so withheld must be reported and paid over by the 20th day following the date on which each such payment of consideration is made. A transferee that is subject to the rules of this paragraph (b)(4)(iv) may not obtain a withholding certificate pursuant to § 1.1445-3, but must instead withhold and pay over the amounts required by this paragraph.

(c) *Transferred property not a U.S. real property interest—*(1) *In general.* No withholding is required under section 1445 if the transferee acquires only property that is not a U.S. real property interest. As defined in section 897(c) and § 1.897-1(c), a U.S. real property interest includes certain interests

in U.S. corporations, as well as direct interests in real property and certain associated personal property. This paragraph (c) provides rules pursuant to which a person acquiring an interest in a U.S. corporation may determine that withholding is not required because that interest is not a U.S. real property interest. To determine whether an interest in tangible property constitutes a U.S. real property interest the acquisition of which would be subject to withholding, see § 1.897-1 (b) and (c).

(2) *Interests in publicly traded entities.* No withholding is required under section 1445(a) upon the acquisition of an interest in a domestic corporation if any class of stock of the corporation is regularly traded on an established securities market.

This exemption shall apply if the disposition is incident to an initial public offering of stock pursuant to a registration statement filed with the Securities and Exchange Commission. Similarly, no withholding is required under section 1445(a) upon the acquisition of an interest in a publicly traded partnership or trust. However, the rule of this paragraph (c)(2) shall not apply to the acquisition, from a single transferor in a single (or related transferors (as defined in § 1.897-1(i)) transaction (or related transactions), of an interest described in § 1.897-1(c)(2)(iii)(B) (relating to substantial amounts of non-publicly traded interests in publicly traded corporations) or to similar interests in publicly traded partnerships or trusts. The person making an acquisition described in the preceding sentence must otherwise determine whether withholding is required, pursuant to section 1445 and the regulations thereunder. Transactions shall be deemed to be related if they are undertaken within 90 days of one another or if it can otherwise be shown that they were undertaken in pursuance of a prearranged plan.

(3) *Transferee receives statement that interest in corporation is not a U.S. real property interest—*(i) *In general.* No withholding is required under section 1445(a) upon the acquisition of an interest in a domestic corporation, if the transferor provides the transferee with a copy of a statement, issued by the

corporation pursuant to § 1.897-2(h), certifying that the interest is not a U.S. real property interest. In general, a corporation may issue such a statement only if the corporation was not a U.S. real property holding corporation at any time during the previous five years (or the period in which the interest was held by its present holder, if shorter) or if interests in the corporation ceased to be United States real property interests under section 897(c)(1)(B). (A corporation may not provide such a statement based on its determination that the interest in question is an interest solely as a creditor). See § 1.897-2 (f) and (h). The corporation may provide such a statement directly to the transferee at the transferor's request. The transferor must request such a statement prior to the transfer, and shall, to the extent possible, specify the anticipated date of the transfer. A corporation's statement may be relied upon for purposes of this paragraph (c)(3) only if the statement is dated not more than 30 days prior to the date of the transfer. A transferee may also rely upon a corporation's statement that is voluntarily provided by the corporation in response to a request from the transferee, if that statement otherwise complies with the requirements of this paragraph (c)(3) and § 1.897-2(h).

(ii) *Reliance on statement not permitted.* A transferee is not entitled to rely upon a statement that a corporation is not a U.S. real property holding corporation if, prior to or at the time of the transfer, the transferee either—

(A) Has actual knowledge that the statement is false, or

(B) Receives a notice that the statement is false from a transferor's or transferee's agent, pursuant to § 1.1445-4.

Such a transferee's withholding obligations shall apply as if a statement had never been given, and such a transferee may be held fully liable pursuant to § 1.1445-1(e) for any failure to withhold.

(iii) *Belated notice of false statement.* If after the date of the transfer, a transferee receives notice that a statement provided under § 1.1445-2(c)(3)(i) (that an interest in a corporation is not a U.S. real property interest) is false, then such transferee may rely on the

statement only with respect to consideration that was paid prior to the receipt of the notice.

Such a transferee is required to withhold a full 10 percent of the amount realized from the consideration that remains to be paid to the transferor, if possible. Thus, if 10 percent or more of the amount realized remains to be paid to the transferor, then the transferee is required to withhold and pay over the full 10 percent. The transferee must do so by withholding and paying over the entire amount of each successive payment of consideration to the transferor, until the full 10 percent of the amount realized has been withheld and paid over. Amounts so withheld must be reported and paid over by the 20th day following the date on which each such payment of consideration is made. A transferee that is subject to the rules of this § 1.1445-2(c)(3)(iii) may not obtain a withholding certificate pursuant to § 1.1445-3, but must instead withhold and pay over the amounts required by this paragraph.

(d) *Exceptions to requirement of withholding*—(1) *Purchase of residence for \$300,000 or less.* No withholding is required under section 1445(a) if one or more individual transferees acquire a U.S. real property interest for use as a residence and the amount realized on the transaction is \$300,000 or less. For purposes of this section, a U.S. real property interest is acquired for use as a residence if on the date of the transfer the transferee (or transferees) has definite plans to reside at the property for at least 50 percent of the number of days that the property is used by any person during each of the first two 12-month periods following the date of the transfer. The number of days that the property will be vacant is not taken into account in determining the number of days such property is used by any person. A transferee shall be considered to reside at a property on any day on which a member of the transferee's family, as defined in section 267(c)(4), resides at the property. No form or other document need be filed with the Internal Revenue Service to establish a transferee's entitlement to rely upon the exception provided by this paragraph (d)(1). A transferee who fails to withhold in reliance upon this

exception, but who does not in fact reside at the property for the minimum number of days set forth above, shall be liable for the failure to withhold (if the transferor was a foreign person and did not pay the full U.S. tax due on any gain recognized upon the transfer). However, if the transferee establishes that the failure to reside the minimum number of days was caused by a change in circumstances that could not reasonably have been anticipated at the time of the transfer, then the transferee shall not be liable for the failure to withhold.

The exception provided by paragraph (d)(1) does not apply in any case where the transferee is other than an individual even if the property is acquired for or on behalf of an individual who will use the property as a residence. However, this exception applies regardless of the organizational structure of the transferor (i.e., regardless of whether the transferor is an individual, partnership, trust, corporation, etc.).

(2) *Coordination with nonrecognition provisions*—(i) *In general.* A transferee shall not be required to withhold under section 1445(a) with respect to the transfer of a U.S. real property interest if—

(A) The transferor notifies the transferee, in the manner described in paragraph (d)(2)(iii) of this section, that by reason of the operation of a nonrecognition provision of the Internal Revenue Code or the provisions of any United States treaty the transferor is not required to recognize any gain or loss with respect to the transfer, and

(B) By the 20th day after the date of the transfer the transferee provides a copy of the transferor's notice to the Assistant Commissioner (International), at the address provided in § 1.1445-1(g)(10), together with a cover letter setting forth the name, identifying number (if any), and home address (in the case of an individual) or office address (in the case of an entity) of the transferee providing the notice to the Service. The rule of this paragraph (d)(2)(i) is subject to the exceptions set forth in paragraph (d)(2)(ii). For purposes of this paragraph (d)(2) a nonrecognition provision is any provision of the Internal Revenue Code for not recognizing gain or loss.

(ii) *Exceptions.* A transferee may not rely upon the rule of paragraph (d)(2)(i) of this section, and must therefore withhold under section 1445(a) with respect to the transfer of a U.S. real property interest, if either:

(A) The transferor qualifies for nonrecognition treatment with respect to part, but not all, of the gain realized by the transferor upon the transfer, or

(B) The transferee knows or has reason to know that the transferor is not entitled to the nonrecognition treatment claimed by the transferor.

In either of the above circumstances the transferee or transferor may request a withholding certificate from the Internal Revenue Service pursuant to the rules of § 1.1445-3.

(3) *Special procedural rules applicable to foreclosures*—(i) *Amount to be withheld*—(A) *foreclosures.* A transferee that acquires a U.S. real property interest pursuant to a repossession or foreclosure on such property under a mortgage, security agreement, deed of trust or other instrument securing a debt must withhold tax under section 1445(a) equal to 10 percent of the amount realized on such sale. Such amount must be reported and paid over to the Service under the general rules of § 1.1445-1. However, if the transferee complies with the notice requirements of § 1.1445-2(d)(3) (ii) and (iii), such transferee may report and pay over to the Service on or before the 20th day following the final determination by a court or trustee with jurisdiction over the foreclosure action, the lesser of:

(1) The amount otherwise required to be withheld under section 1445(a), or

(2) The "alternative amount" as defined in the succeeding sentence. The alternative amount is the entire amount, if any, determined by a court or trustee with jurisdiction over the matter, that accrues to the debtor/transferor out of the amount realized from the foreclosure sale. The amount of any mortgage, lien, or other security agreement secured by the property, that is terminated, assumed by another person, or otherwise extinguished (as to the debtor/transferor) shall not be treated as an amount that accrues to the debtor/transferor for purposes of this § 1.1445-2(d)(3)(i)(A). If the alternative amount is zero, no withholding

is required. Any difference between the amount withheld at the time of the foreclosure sale and the amount to be reported and paid over to the Service must be transferred to the court or trustee with jurisdiction over the foreclosure action. Amounts withheld, if any, are to be reported and paid to the Service by using Forms 8288 and 8288-A in conformity with § 1.1445-1(d).

(B) *Deeds in lieu of foreclosures.* A transferee of a U.S. real property interest pursuant to a deed in lieu of foreclosure must withhold tax equal to 10 percent of the amount realized by the debtor/transferor on the transfer. However, no withholding is required if:

(1) The transferee is the only person with a security interest in the property,

(2) No cash or other property (other than incidental fees incurred with respect to the transfer) is paid, directly or indirectly, to any person with respect to the transfer, and

(3) The notice requirement of § 1.1445-2(d)(3) are satisfied.

The amount withheld, if any, must be reported and paid over to the Service not later than the 20th day following the date of transfer. In a case where withholding would otherwise be required, a withholding certificate may be requested in accordance with § 1.1445-3.

(ii) *Notice to the court or trustee in a foreclosure action—(A) Notice on day of purchase.* A transferee in a foreclosure sale that chooses to use the special rules applicable to foreclosures must provide notice to the court or trustee with jurisdiction over the foreclosure action on the day the property is transferred with respect to such transferee's withholding obligation. No particular form is necessary but the notice must set forth the transferee's name, home address in the case of an individual, office address in the case of an entity, a brief description of the property, the date of the transfer, the amount realized on the sale of the foreclosed property and the amount withheld under section 1445(a).

(B) *Notice whether amount withheld or alternative amount is reported and paid over to the Service.* A purchaser/transferee in a foreclosure that chooses to use the special rules applicable to fore-

closures must provide notice to the court or trustee with jurisdiction over the foreclosure action regarding whether the amount withheld or the alternative amount will be (or has been) reported and paid over to the Service. The notice should set forth all the information required by the preceding paragraph (d)(3)(ii)(A), the amount withheld or alternative amount that will be (or has been) reported and paid over to the Service, and the amount that will be (or has been) paid over to the court or trustee.

(iii) *Notice to the Service—(A) General rule.* A transferee that in reliance upon the rules of this paragraph (d)(3) withholds an alternative amount (or does not withhold because the alternative amount is zero) must, on or before the 20th day following the final determination by a court or trustee in a foreclosure action or on or before the 20th day following the date of the transfer with respect to a transfer pursuant to a deed in lieu of foreclosure, provide notice thereof to the Assistant Commissioner (International) at the address provided in § 1.1445-1(g)(10). (The filing of such a notice shall not relieve a creditor of any obligation it may have to file a notice pursuant to section 6050J and the regulations thereunder.) No particular form is required but the following information must be set forth in paragraphs labelled to correspond with the numbers set forth below.

(1) A statement that the notice constitutes a notice of foreclosure action or transfer pursuant to a deed in lieu of foreclosure under § 1.1445-2(d)(3).

(2) The name, identifying number (if any) and home address (in the case of an individual) or office address (in the case of an entity) of the purchaser/transferee.

(3) The name, identifying number (if any), and home address (in the case of an individual) or office address (in the case of an entity) of the debtor/transferor.

(4) In a foreclosure action, the date of the final determination by a court or trustee regarding the distribution of the amount realized from the foreclosure sale. In a transfer pursuant to a deed in lieu of foreclosure, the date the

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property is transferred to the purchaser/transferee.

(5) A brief description of the property.

(6) The amount realized from the foreclosure sale or with respect to the transfer pursuant to a deed in lieu of foreclosure.

(7) The alternative amount.

(B) *Special rule for lenders required to file Form 1099-A where the alternative amount is zero.* A person required under section 6050J to file Form 1099-A does not have to comply with the notice requirement of § 1.1445-2(d)(3)(iii)(A) if the alternative amount is zero. In such case, the filing of the Form 1099-A will be deemed to satisfy the notice requirements of § 1.1445-2(d)(3)(iii)(A).

(iv) *Requirements not applicable.* A transferee is not required to withhold tax or provide notice pursuant to the rules of this paragraph (d)(3) if no substantive withholding liability applies to the transfer of the property by the debtor/transferor. For example, if the debtor/transferor provides the transferee with a certification of non-foreign status pursuant to paragraph (b) of this section, then no substantive withholding liability would exist with respect to the acquisition of the property from the debtor transferor. In such a case, no withholding of tax or notice to the Internal Revenue Service is required of the transferee with respect to the repossession or foreclosure.

(v) *Anti-abuse rule.* If a U.S. real property interest is transferred in foreclosure or pursuant to a deed in lieu of foreclosure for a principal purpose of avoiding the requirements of section 1445(a), then the provisions of this paragraph (d)(3) shall not apply to the transfer and the transferee shall be fully liable for any failure to withhold with respect to the transfer. A principal purpose to avoid section 1445(a) will be presumed (subject to rebuttal on the basis of all relevant facts and circumstances) if:

(A) The transferee acquires property in which it, or a related party, has a security interest;

(B) The security interest did not arise in connection with the debtor/transferor's or a related party's or

predecessor in interest's acquisition, improvement, or maintenance of the property; and

(C) The total amount of all debts secured by the property exceeds 90 percent of the fair market value of the property.

(4) *Installment payments.* A transferee of a U.S. real property interest is not required to withhold under section 1445 when making installment payments on an obligation arising out of a disposition that took place before January 1, 1985. With respect to disposition that take place after December 31, 1984, the transferee shall be required to satisfy its entire withholding obligation within the time specified in § 1.1445-1(c) regardless of the amount actually paid by the transferee. Thereafter, no withholding is required upon further installment payments on an obligation arising out of the transfer. A transferee that is unable to satisfy its entire withholding obligation within the time specified in § 1.1445-1(c) may request a withholding certificate pursuant to § 1.1445-3.

(5) *Acquisitions by governmental bodies.* No withholding of tax is required under section 1445 with respect to any acquisition of property by the United States, a state or possession of the United States, a political subdivision thereof, or the District of Columbia.

(6) [Reserved]

(7) *Withholding certificate obtained by transferee or transferor.* No withholding is required under section 1445(a) if the transferee is provided with a withholding certificate that so specifies. Either the transferor or the transferee may seek a withholding certificate from the Internal Revenue Service, pursuant to the provisions of § 1.1445-3.

(8) *Amount realized by transferor is zero.* If the amount realized by transferor on a transfer of a U.S. real property interest is zero, no withholding is required.

[T.D. 8113, 51 FR 46633, Dec. 24, 1986; 52 FR 3917, Feb. 6, 1987; as amended at T.D. 8198, 53 FR 16230, May 5, 1988]